

Supreme Court of the United States  
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(2)

No. 91-512

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1991

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JILL S. KAMEN,

*Petitioner,*

vs.

KEMPER FINANCIAL SERVICES, INC. and  
CASH EQUIVALENT FUND, INC.,

*Respondents.*

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Petition For Writ Of Certiorari To The United  
States Court Of Appeals For The Seventh Circuit

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BRIEF IN OPPOSITION OF RESPONDENT  
KEMPER FINANCIAL SERVICES, INC.

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## QUESTIONS PRESENTED

1. Whether certiorari should be granted to review the Seventh Circuit's holding that petitioner's complaint failed to plead facts sufficient to establish that a demand on the board of directors would have been futile under Maryland law, where that holding does not conflict with any prior decision of any other court addressing the federal policies underlying the Investment Company Act of 1940, and does not raise any substantial or recurring question of federal law.

2. Whether certiorari should be granted to review the Seventh Circuit's application of Maryland law to the circumstances of this case, where the court's decision is correct and does not conflict with any prior decision construing Maryland law.

**RULE 29.1 LISTING**

The following entities are parent corporations and subsidiaries (not wholly owned) of respondent Kemper Financial Services, Inc.:

*Parent Corporations:*

Kemper Financial Companies, Inc.  
Kemper Corporation  
Lumbermens Mutual Casualty Company

*Subsidiaries Not Wholly Owned:*

Dimensional Fund Advisers, Inc.  
Investors Fiduciary Trust Company  
BSN Gestion de Patrimonios, S.A.

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BRIEF IN OPPOSITION OF RESPONDENT  
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OPINIONS BELOW

This case previously has been before this Court, and the Court's May 20, 1991 opinion is unofficially reported at 111 S. Ct. 1711 (1991). The February 2, 1987 opinion of the United States District Court for the Northern District of Illinois is reported at 659 F. Supp. 1153 (N.D. Ill. 1987). The July 18, 1990 opinion of the United States Court of Appeals for the Seventh Circuit is reported at 908 F.2d 1338 (7th Cir. 1990). The Seventh Circuit's August 7, 1991 opinion on remand from this Court is reported at 939 F.2d 458 (7th Cir. 1991).

## STATEMENT OF THE CASE

### 1. The Parties.

Petitioner Jill S. Kamen is a shareholder in respondent Cash Equivalent Fund, Inc. (the "Fund"), a money market mutual fund which is registered under the Investment Company Act of 1940 (the "1940 Act"), 15 U.S.C. §§ 80a-1 *et seq.* Respondent Kemper Financial Services, Inc. ("KFS") is the investment adviser and underwriter of the Fund. (See Pet. App. 97-98.)

### 2. The Prior Proceedings In The Lower Courts.

On May 10, 1985, petitioner filed a one-count complaint which asserted claims against KFS and the Fund under Sections 20(a) and 36(b) of the 1940 Act, 15 U.S.C. §§ 80a-20(a), 80a-35(b). (Pet. App. 97-106.)<sup>1</sup> Petitioner's Section 20(a) claim, which is the only claim relevant to the issues raised in the present petition, stems from one sentence in a 1984 proxy statement which described the fees that KFS charged to another mutual fund, Kemper Money Market Fund ("KMMF"). (Pet. App. 102-03.) Petitioner alleged that the proxy statement "misleadingly described the fees" charged to the Fund by omitting to list the precise structure of the fees which KFS charged to KMMF, and thus "gave the false impression" that the fees charged to the Fund were lower than those charged to KMMF. (*Id.*) However, petitioner did not allege that the statement itself was false. Nor did she allege that KFS had acted fraudulently, intentionally, or even negligent-

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<sup>1</sup> Petitioner filed three successive complaints, the allegations of which are substantially the same. For purposes of simplicity, we refer only to the last of those complaints, which was filed on December 8, 1986. (See Pet. App. 97-106.)



ly. Moreover, only KFS was charged with improper conduct. (*See id.*) Petitioner did not sue the Fund's directors individually, and she did not allege that any director was aware of the challenged statement or of the "false impression" that it purportedly created.<sup>2</sup>

KFS and the Fund moved to dismiss petitioner's Section 20(a) claim on the ground that she had not made a pre-suit demand on the Fund's directors. On February 2, 1987, the district court granted the motion to dismiss, holding that petitioner's allegations of futility were insufficient to excuse demand under Fed. R. Civ. P. 23.1 and relevant federal case authorities. (Pet. App. 79-88.)

On appeal, petitioner argued that she had pleaded facts sufficient to excuse demand, and she suggested, for the first time in her reply brief, that state (rather than federal) law should govern the contours of the demand requirement and the futility exception. (*See* Pet. App. 40-41.) The Seventh Circuit affirmed the dismissal of petitioner's Section 20(a) claim, holding that the district court "thought [petitioner's] allegations insufficient to excuse a demand under Rule 23.1, as do we." (Pet. App. 38.) The Seventh Circuit also held that petitioner's state law argument had been waived (Pet. App. 40-41), and that the futility exception to the demand requirement should be eliminated as a matter of federal common law. (Pet. App. 52-53.)

### 3. The Prior Proceedings In This Court.

This Court subsequently granted certiorari. In this Court, petitioner and *amici* argued that the contours of the de-

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<sup>2</sup> Although petitioner now asserts that this case involves "proxy fraud" (Pet. 15), there is no support for that assertion in the com-

(Footnote continued on following page)

mand requirement and the futility exception should be determined by reference to the law of Maryland, the Fund's state of incorporation.

On May 20, 1991, this Court reversed the decision below. (Pet. App. 11-32.) The Court confirmed that Fed. R. Civ. P. 23.1 governs the particularity with which a plaintiff must plead the reasons for failing to make a demand. (See Pet. App. 16.) Under *Burks v. Lasker*, 441 U.S. 471 (1979), however, the Court also concluded that the substantive contours of the demand requirement and its futility exception must be ascertained by reference to state law. (Pet. App. 31-32.) The Court thus remanded the case and directed the Seventh Circuit to determine whether petitioner's failure to make a demand was excused under Maryland law. This Court stated (Pet. App. 32 n.10):

Because the Court of Appeals applied a universal-demand rule, it never addressed the sufficiency of petitioner's complaint with reference to the futility exception as defined by the law of Maryland, the State in which the Fund is incorporated. Rather than take the issue up for the first time ourselves, we leave for the Court of Appeals on remand the question whether petitioner adequately pleaded excuse of demand for purposes of rule 23.1.

#### 4. The Proceedings On Remand.

On remand, the parties submitted written statements as to what further action would be appropriate in this

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<sup>2</sup> continued

plaint or anywhere else in the record. Similarly, there is no record support for petitioner's present, and patently false, assertion that the Fund's legal counsel was "an interested person of the Adviser." (Pet. 14 n.3.)

case.<sup>3</sup> KFS and the Fund argued that the allegations of petitioner's complaint were insufficient to excuse demand under Maryland law and asked the Seventh Circuit to affirm the dismissal of petitioner's Section 20(a) claim. Petitioner suggested that the demand issue should be remanded for consideration by the district court. In the alternative, she invited the Seventh Circuit to rule that demand was excused as futile under Maryland law. Petitioner did not argue, as she now does in her petition (*see* Pet. 5-9), that requiring demand in the circumstances at bar would conflict with the federal securities laws or the policies underlying them.

On August 7, 1991, the Seventh Circuit issued its decision. (Pet. App. 1-10.) The Seventh Circuit carefully assessed the sufficiency of petitioner's purported reasons for failing to make a demand (Pet. App. 2 3):

1. The seven independent directors on the ten-person board received "aggregate remuneration of approximately \$300,000 a year" for their role as directors of the Cash Equivalent Fund and other members of the Kemper Group.
2. The directors voted to circulate the proxy statement containing the statement to which [petitioner] objects.
3. A demand would have been tantamount to a request that the directors sue themselves.

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<sup>3</sup> The parties submitted their statements pursuant to Seventh Circuit Rule 54, which provides that "[w]hen the Supreme Court remands a case to this court for further proceedings, counsel for the parties shall . . . file statements of their positions as to the action which ought to be taken by this court on remand." *See* 7th Cir. R. 54.

4. The directors were “under the control” of Kemper.
5. The Fund sought to dismiss her complaint on substantive as well as procedural grounds.<sup>4</sup>

The Seventh Circuit undertook a close, independent survey of all relevant Maryland authorities dating back nearly a century, including some not cited by either party. Based on these authorities, the Seventh Circuit observed that Maryland, “[l]ike most states, . . . requires demand as a norm” (Pet. App. 3), and held that petitioner’s complaint allegations were insufficient to excuse demand. (Pet. App. 3-9.)

The Seventh Circuit first concluded that Allegations 1 and 4 were insufficient because, “[i]f allegations of this kind sufficed, the demand rule would be negated.” (Pet. App. 4.) With respect to Allegation 4, the court further concluded that the assertion that the directors were “under the control” of Kemper did not comply with the particularity requirement of Rule 23.1. (*Id.*)

The Seventh Circuit also found that Allegation 3 was insufficient under Maryland law (Pet. App. 4-5):

As [petitioner] does not believe that the facts justify action against the directors individually, demand would not have implied that the directors should go sue themselves. Maryland does not think it sufficient that something bad happened on a director’s watch; it requires proof of wrongdoing. E.g., *Waller v. Waller*,

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<sup>4</sup> The Seventh Circuit also rejected petitioner’s conclusory allegation that “[f]ederal ‘policy’ established by the Investment Company Act of 1940 augurs against demand,” which it found insufficient in light of this Court’s conclusion that application of Maryland law to the demand issue in this case was not precluded by any federal rule or policy. (Pet. App. 3.)

187 Md. [185,] 190-91, 49 A.2d [449,] 452-53 [(1946)];  
*Booth v. Robinson*, 55 Md. 419 (1880).

Concerning Allegation 2, that the Fund directors voted to circulate the challenged proxy statement, the Seventh Circuit concluded that the directors' approval of the proxy statement was insufficient to excuse demand under Maryland law, particularly in view of the fact that petitioner had "never argued that [the directors] even noticed the single sentence of which she complains." (Pet. App. 5-7.)

Finally, with respect to Allegation 5, that the Fund opposed petitioner's lawsuit once it was filed, the Seventh Circuit concluded that directorial opposition to a filed lawsuit does not establish futility under Maryland law (Pet. App. 8-9):

If substantive opposition retroactively excuses demand, why would any investor demand action? If the firm opposed the suit, then the opposition would show the futility of demand; if however the firm embraced and prosecuted the plaintiff's claim, then the plaintiff would receive all the relief the court could have awarded. Demand would be defunct. Yet Maryland says that demand is the norm. It must follow that the directors' substantive opposition does not obviate demand.

Thus, the Seventh Circuit held that petitioner had failed to plead facts sufficient to meet the futility exception under Maryland law, and it therefore affirmed the dismissal of petitioner's Section 20(a) claim. (Pet. App. 9-10.) Petitioner thereafter filed her petition for a writ of certiorari.<sup>5</sup>

<sup>5</sup> The present petition is the third that petitioner has filed in this case, and it is the ninth brief which petitioner has filed, at every level of the federal system, concerning the demand issue. In the course of her numerous briefs, petitioner repeatedly has changed

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## REASONS FOR DENYING THE WRIT

The holding of the Seventh Circuit does not conflict with the decision of any other state or federal court. No court ever has held that the existence of any pre-suit demand requirement (or any futility exception thereto, however narrowly construed) conflicts with any policy underlying the 1940 Act. Nor has any court ever held that demand must be excused, as a matter of Maryland law, in circumstances analogous to those presented here. The decision below is correct, as a matter of federal and Maryland law, and therefore warrants no further review.

By virtue of this Court's prior decision in this case, as well as the several decisions rendered by the Seventh Circuit and the district court, petitioner's Section 20(a) claim now has been dismissed under every rule of decision which conceivably could be said to apply to this case. Petitioner has not presented any persuasive reason to subject to further review the considered judgment of the Seventh Circuit, which has carried out this Court's mandate. In sum, because the Seventh Circuit's decision does not conflict with the decision of any other court, involves only a case-specific application of Maryland law, presents no substantial question of recurring or general importance, and is correct in any event, the petition for a writ of certiorari should be denied.

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<sup>5</sup> *continued*

her position concerning the applicable law and added new arguments, and KFS in turn has been required to devote considerable time and expense in responding to petitioner's ever-changing contentions. No further review of the demand issue is appropriate; it is time for this action, which has been pending for over six years, to proceed to an adjudication on the merits of the remaining claim.



I.

**THE DECISION BELOW DOES NOT CONFLICT WITH ANY PRIOR DECISION OF THIS OR ANY OTHER COURT.**

At the urging of petitioner and *amici*, this Court previously held in this case that the contours of the pre-suit demand requirement applicable to petitioner's Section 20(a) claim should be governed, not by an independent federal common law rule, but by the rule of decision adopted by the State of Maryland. (Pet. App. 31-32.) In accordance with this Court's directions, the Seventh Circuit on remand adjudicated the question framed by this Court: whether, under Maryland law, petitioner had set forth facts sufficient to establish that a pre-suit demand on the directors would have been futile. (Pet. App. 1.) The Seventh Circuit concluded that petitioner's allegations were insufficient to excuse demand under Maryland law. (Pet. App. 3-9.) That holding is correct, and it does not conflict with any prior decision of this or any other court.<sup>6</sup>

**A. The Decision Below Does Not Conflict With Any Prior Decision Construing The 1940 Act Or Any Other Federal Securities Law.**

The Seventh Circuit's holding under Maryland law does not conflict with any prior decision construing the 1940

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<sup>6</sup> In her first question presented, petitioner erroneously characterizes the Seventh Circuit's decision as having interpreted Maryland law "to require a futile demand upon directors." (Pet. i.) Nothing could be further from the truth. The Seventh Circuit specifically held that petitioner had failed to establish that demand would have been futile under Maryland law. (Pet. App. 3-9.) The district court previously had reached the same conclusion under federal law. (Pet. App. 79-88.) Thus, every court to have considered the issue in this case has explicitly rejected petitioner's contention that demand would have been "futile."

Act. Indeed, the Seventh Circuit's holding does not conflict with any prior decision construing any of the federal securities laws or the policies allegedly underlying them.

Petitioner nonetheless contends that the Seventh Circuit's holding under Maryland law somehow has created a conflict of sufficient importance to warrant review by this Court. (See Pet. 5-9.) Although the precise nature of petitioner's purported conflict is far from clear (*see id.*), petitioner appears to argue either (1) that the application of any pre-suit demand requirement in a derivative proxy action "conflicts" with federal case decisions and policy, or (2) that the Seventh Circuit's holding that demand was not excused in the specific circumstances of this case "conflicts" with federal case decisions and policy. Under either formulation, petitioner has failed to demonstrate the existence of any issue warranting plenary review.<sup>7</sup>

If petitioner is attempting to argue categorically that all pre-suit demand requirements would conflict with federal law, this Court already has rejected that argument in its prior decision in this case. Although this Court did not stake out the precise contours of Maryland law when this case was last before the Court, it was then common ground that Maryland law recognizes that demand is the

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<sup>7</sup> While petitioner urged reversal of the Seventh Circuit's prior decision for the specific reason that it applied federal rather than Maryland law to the demand issue, she now accuses the Seventh Circuit of engaging in "a play of intellectual legerdemain" because it complied with this Court's directions to apply Maryland law. (Pet. 6-7.) At all events, petitioner did not even advance her "federal policy" arguments in her brief on remand; her only argument in the Seventh Circuit was that demand was excused as a matter of Maryland law. This Court should not now consider petitioner's argument, which was not raised below. See *Youngberg v. Romeo*, 457 U.S. 307, 316 n.19 (1982).



norm and will be judged unnecessary only when an adequate excuse is pleaded. (Pet. App. 31-32 & n.10.) Had this Court perceived any categorical federal barrier to the application of Maryland's demand requirement, there would have been no need for a remand for consideration of whether "petitioner adequately pleaded excuse of demand." (Pet. App. 32 n.10.)<sup>8</sup>

If, on the other hand, petitioner is arguing that the Seventh Circuit's application of Maryland's demand requirement to the particular circumstances of this case conflicts with federal law, she has failed to present any issue of sufficient general importance to warrant review by this Court. (See pages 17-18, *infra*.)

At all events, and irrespective of the precise thrust of petitioner's argument, further review is unwarranted because the Seventh Circuit's construction of Maryland law does not conflict with the holding of any other court. No court ever has held that Maryland's demand requirement or futility exception conflicts with any policy underlying the 1940 Act or any other federal securities law. Indeed, no court ever has found any conflict between these federal laws, on the one hand, and any state's formulation of the demand requirement or the futility exception, on the other hand.<sup>9</sup>

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<sup>8</sup> Thus, the Seventh Circuit's holding does not conflict in any way with the decisions of this Court which observe that state law must give way if its application would undermine federal policy. (See Pet. 5-6.) The Seventh Circuit's decision recognized this important qualification and concluded that it was inapplicable here, in view of this Court's conclusion that "no federal rule prevents the application of Maryland law" to the demand issue. (Pet. App. 3.)

<sup>9</sup> It is particularly understandable that no court has so held with respect to the 1940 Act, because the demand requirement is entirely consistent with the underlying policies of the Act. The 1940

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The cases cited by petitioner do not establish the existence of a conflict, for the simple but compelling reason that they have nothing to do with the demand requirement. (See Pet. 7-8.) For example, *Galef v. Alexander*, 615 F.2d 51 (2d Cir. 1980), the primary authority which petitioner cites in support of her purported “conflict” (Pet. 7-8), holds only that a claim against the directors under Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a), is not subject to summary dismissal by those same directors under the “business judgment” rule. *Id.* at 63-64 (citing *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964)).<sup>10</sup> That holding bears no relation to the demand requirement; to the contrary, the *Galef* court explicitly stated that “[c]ases . . . in which there has been no demand, do not answer the question presented here.” 615 F.2d at 59. Most important, the court of appeals in *Galef* found no tension whatsoever between its holding concerning the “business judgment” rule and the existence of “the generally prevailing state law requirements that a demand be made on directors.” *See id.*

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<sup>9</sup> *continued*

Act specifically designates a fund’s disinterested directors as “independent watchdogs” over the fund. *See Burks*, 441 U.S. at 484 (citation omitted); *see also, e.g.*, 15 U.S.C. §§ 80a-15(c), 80a-16(b), and 80a-31(a). Allowing the directors of a fund to decide, in the first instance, whether to file suit or take other appropriate actions to remedy an alleged proxy violation, as required by state law, also ensures that the independent directors will have the opportunity to discharge their statutorily-mandated “watchdog” duties.

<sup>10</sup> Unlike *Galef*, the case at bar does not involve any claims against the directors. Indeed, petitioner’s complaint does not contain a single allegation suggesting that any director knowingly participated in any wrongdoing. At all events, *Galef* is distinguishable because it is not a 1940 Act case, and it therefore contains no discussion of the policies underlying that Act.

Nor does the holding of the Seventh Circuit conflict with the generalized pronouncements which petitioner cites, from miscellaneous and largely nonjudicial sources, to the effect that shareholders play an important role in enforcing the federal securities laws. (*See* Pet. 6-9.) That principle is true enough, but it does not conflict in any way with the holding below. In no sense can a general recognition as to the desirability of certain forms of legal action be said necessarily to conflict with the imposition of reasonable preconditions (such as a demand requirement) to the filing of such actions. Nor is there any case holding to the contrary. Thus, the generalized pronouncements cited by petitioner do not suggest, let alone establish, the existence of a direct and irreconcilable conflict warranting review by this Court.<sup>11</sup>

**B. The Decision Below Does Not Conflict With Any Prior Decision Construing Maryland Law.**

Petitioner also seeks review of the Seventh Circuit's decision on the ground that it conflicts with Maryland law as articulated in *Parish v. Maryland & Virginia Milk*

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<sup>11</sup> Petitioner also cites this Court's prior decision in this case for the general proposition that the 1940 Act "clearly envisions an *enhanced* role for shareholders in protecting investment companies from conflicts of interest." (Pet. 6; emphasis in original.) However, the passage cited by petitioner refers to actions under Section 36(b), in which the Act specifically provides for a shareholder-initiated suit against an investment adviser for breach of fiduciary duty. In light of Section 36(b), this Court observed only that a federal "universal" demand rule is not required to satisfy the "broader policy objectives" of the 1940 Act. (Pet. App. 31.) This does not mean, as petitioner suggests, that Maryland law, which places on directors the duty to decide in the first instance whether to initiate suit, unless it is shown that they would not fairly consider the matter, somehow conflicts with the policies underlying the 1940 Act.

*Producers Ass'n*, 250 Md. 24, 242 A.2d 512 (1968), *cert. denied*, 404 U.S. 940 (1971). (Pet. i, 9-16.) Petitioner's contention is plainly unpersuasive. Any possible conflict with *Parish* would present nothing more than a disagreement as to the meaning of state law, concerning which this Court could not render a definitive construction, and to which the Court ought not therefore devote its scarce resources.<sup>12</sup>

At all events, there is no substance to petitioner's assertion that the Seventh Circuit's decision conflicts with *Parish*. In fact, the Seventh Circuit relied extensively on *Parish* throughout its opinion and correctly applied it to the circumstances of this case. (Pet. App. 3-9.) In view of the court's fidelity to *Parish*, and to other relevant Maryland authorities (several of which the Seventh Circuit located without any assistance from the parties), petitioner is constrained to support her conflict theory by material mischaracterizations of the relevant authorities and her complaint allegations.

First, petitioner wrenches the Seventh Circuit's observation that "... demand is necessary if the directors . . . are financially disinterested . . ." (Pet. App. 6) out of its proper context and attempts to portray it as a sweeping and dispositive principle that is inconsistent with *Parish*, in which the court concluded that demand was excused in the circumstances presented, even though there was

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<sup>12</sup> Petitioner was free to file her claims in Maryland state court if she had any reservations about the way in which the federal courts would apply state law to the circumstances of this case. Petitioner also was free, on remand from this Court, to ask the Seventh Circuit to certify the demand issue to the Maryland Court of Appeals for its guidance. *See* Md. Ann. Code §§ 12-601 *et seq.* (setting forth certification procedure). Petitioner chose not to avail herself of either of these opportunities.

no showing that the directors were financially interested. (See Pet. 13.) The Seventh Circuit's observation was made in the course of its consideration of the adequacy of petitioner's allegation that the directors' involvement in the challenged transaction excused demand. (Pet. App. 5-6.) In that context, the Seventh Circuit did not hold that pre-suit demand invariably will be required whenever the directors are not financially interested. Indeed, that gloss is directly contradicted by the careful consideration which the Seventh Circuit gave to the other reasons upon which petitioner relied for failing to make a demand. Had the Seventh Circuit actually concluded that a finding of financial disinterestedness categorically should end the inquiry, then the court would not have discussed these other reasons.

Second, petitioner erroneously contends that the Seventh Circuit's holding that demand was not excused conflicts with a passage in *Parish* which notes that post-complaint opposition to a lawsuit excuses demand. (Pet. 13-14.) The Seventh Circuit correctly rejected this very argument as misreading the import of *Parish*, observing that the passage cited by petitioner states only that demand on shareholders was unnecessary in view of a shareholders' vote to oppose the litigation. (Pet. App. 8-9.) As the Seventh Circuit correctly recognized, the necessity of shareholder demand turns on considerations, such as the shareholders' inability to ratify fraud, which have no application to director demand. (See *id.*) The court in *Parish* recognized this point as well, giving separate treatment to the issues of director and shareholder demand. Compare 250 Md. at 83-84, 242 A.2d at 545 with 250 Md. at 84-86, 242 A.2d at 545-46.<sup>13</sup>

<sup>13</sup> Petitioner also contends that this Court in *Smith v. Sperling*, 354 U.S. 91, 96-97 (1957), and the Seventh Circuit in *Nussbacher*

(Footnote continued on following page)

Third, petitioner argues that Maryland law excuses demand in cases of "fraud, such as the proxy fraud involved here." (Pet. 15.) However, petitioner cannot create a conflict between the holding of the Seventh Circuit and the requirements of Maryland law merely by incanting some formula of words in her petition. In fact, petitioner's twice-amended complaint neither alleges that anyone committed "fraud" nor alleges that the Fund's directors engaged in wrongful conduct of any kind. As the Seventh Circuit observed, petitioner "does not believe the facts justify action against the directors," and she "has never argued that they even noticed the single sentence of which she complains." (Pet. App. 4, 7.)<sup>14</sup>

<sup>13</sup> *continued*

*v. Continental Illinois Nat'l Bank & Trust Co.*, 518 F.2d 873, 878-79 (7th Cir. 1975), *cert. denied*, 424 U.S. 928 (1976), "held" that post-complaint opposition excuses demand. (Pet. 14.) Petitioner's argument not only proves nothing about the correctness of the Seventh Circuit's interpretation of Maryland law, but also is erroneous. The sole issue in *Smith* was whether a corporation should be realigned as a party plaintiff for jurisdictional purposes, and that decision therefore is inapposite here. See *In re Kauffman Mutual Fund Actions*, 479 F.2d 257, 265 n.5 (1st Cir.), *cert. denied*, 414 U.S. 857 (1973). Similarly, *Nussbacher* is inapposite because it involved pre-litigation, rather than post-litigation, action. See 518 F.2d at 875.

<sup>14</sup> Thus, petitioner's cause is not advanced by her citation to *Zimmerman v. Bell*, 585 F. Supp. 512 (D. Md. 1984), and *Rosengarten v. Buckley*, 565 F. Supp. 193 (D. Md. 1982), for the proposition that "fraud . . . vitiates the demand requirement" (Pet. 15), because she has not alleged any fraudulent conduct in her complaint. Indeed, the district court's decision in *Rosengarten* actually undermines petitioner's continuing efforts to avoid the demand requirement. In that case, the court found that a party's mere characterization of conduct as fraudulent, such as petitioner's unsupported characterization made in her petition, is insufficient to excuse shareholder demand. See 565 F. Supp. at 198.

Equally unavailing is petitioner's extensive reliance on *Oldfield v. Alston*, 77 F.R.D. 735 (N.D. Ga. 1978), which she identifies as

(Footnote continued on following page)



In sum, the holding of the Seventh Circuit does not conflict with the holding of any other court. Consequently, the petition should be denied.

## II.

### THE CASE-SPECIFIC HOLDING OF THE COURT BELOW DOES NOT PRESENT ANY ISSUE OF SUBSTANTIAL IMPORTANCE AND IS CORRECT IN ANY EVENT.

The petition should be denied for the additional reason that it seeks review of a particularized application of Maryland law which is unlikely to arise in future cases with any frequency. *Cf. Massachusetts v. Sheppard*, 468 U.S. 981, 988 n.5 (1984) (declining to consider argument because it presented "fact-bound issue of little importance since similar situations are unlikely to arise with any regularity"). Although shareholder derivative actions have been in existence for more than a century, the scope of Maryland's pre-suit demand requirement has been touched upon in only a handful of decisions. Particularly in view of the case-specific inquiry which the Seventh Circuit was required to undertake, it is doubtful that the court's holding will have any implications for future cases. At most, the court's holding will be of arguable relevance only rarely,

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<sup>14</sup> continued

a case "applying Maryland law." (Pet. 15-16.) In reality, the *Oldfield* court purported to construe federal law when addressing director demand in the cited passage, and applied Maryland law only to the issue of shareholder demand. See 77 F.R.D. at 739 (emphasis in original; citation omitted) ("[a]lthough, in interpreting rule 23.1, federal law defines the requirements for demand upon *directors* or *trustees*, this court must look to the applicable state law 'to determine whether demand on *stockholders* is necessary'"). Thus, *Oldfield* has no relevance here.

and it therefore does not present an issue justifying any further expenditure of this Court's limited resources.

In any event, the decision below is correct. The Seventh Circuit properly concluded, in accordance with this Court's prior decision in this case, that "no federal rule prevents the application of Maryland law" to the demand issue. (Pet. App. 3.) Moreover, the Seventh Circuit correctly concluded, based on its careful and independent review of all the relevant Maryland case authorities, that "[l]ike most states, Maryland both requires demand as a norm and excuses demand when the request would be futile." (*Id.*) Finally, the Seventh Circuit properly applied these legal principles in evaluating the sufficiency of the reasons which petitioner had alleged for failing to make a pre-suit demand. (*See* Pet. App. 3-9.)

In rejecting each of petitioner's reasons, the Seventh Circuit recognized that the demand rule would be rendered a nullity if any of those reasons were sufficient to excuse demand. The court also recognized, in accordance with the common sense view of Maryland's highest court, that "if the courts would open their doors to all complaining stockholders without requiring them to show that it was impossible to obtain redress through regular corporate action, litigation of this kind would be endless." *See Waller*, 187 Md. at 192, 49 A.2d at 453; *see also* Pet. App. 9.

The Seventh Circuit's dismissal of petitioner's Section 20(a) claim in the specific circumstances of this case is correct and fully accords with Maryland law. Consequently, further review is not warranted.



**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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